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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 95

ATLANTIC COAST LINE RAILROAD COMPANY,
A CORPORATION, PETITIONER,

vs.

SARAH ELIZABETH STRINGFELLOW, A WIDOW AND AS ADMINISTRATRIX, ETC., RESPONDENT.

BRIEF OF PETITIONER ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

The petition for certiorari filed by the Atlantic Coast Line Railroad Company herein, having been granted by this Court, your petitioner submits the following brief which it prays the Court may be allowed filed herein on the merits of the case.

These causes are now before this Court, as follows:

Sarah Elizabeth Stringfellow, a widow, suing the petitioner for the wrongful death of her minor daughter, Hazel Stringfellow.

Sarah Elizabeth Stringfellow, a widow, suing the petitioner for the wrongful death of her minor son, Jack Stringfellow.

Sarah Elizabeth Stringfellow, as administratrix of the estate of Hazel Stringfellow, suing the petitioner in her representative capacity.

Sarah Elizabeth Stringfellow, as administratrix of the estate of Jack Stringfellow, suing the petitioner in her representative capacity.

These causes were by order of the trial court consolidated and tried before the Honorable Alexander Akerman, District Judge, and a jury, and upon the evidence submitted by both parties resulted in a directed verdict for the defendant, petitioner here, in each of said causes (R., p. 88).

An appeal was taken to the United States Circuit Court of Appeals for the Fifth Circuit (R., p. 50), resulting in a reversal of these causes by that court, and a remand to the district court for a new trial (R., pp. 93 to 103). Certiorari has been granted herein.

Material Facts.

Undisputed Facts.

Guy Stringfellow, husband of plaintiff, and plaintiff's two children, Hazel Stringfellow, seven years of age, and Jack Stringfellow, nine years of age, met their death on March 9th, 1931, in a grade crossing accident in the incorporated town of Dunedin, Florida, the accident happening about 6:00 o'clock in the afternoon (R., pp. 54-55).

The defendant's tracks ran north and south at this point and Scotland Street, upon which the accident happened, runs east and west (R. 56). The Dunedin railroad station, one block north of the scene of the accident, was a flag stop for this particular train, but which on occasions, when not flagged, slowed up for the purpose of taking on mail (R., p. 85).

Guy Stringfellow, the driver of the automobile in which his two children were riding, lived in the town of Dunedin,

was familiar with the crossing and had crossed it frequently (R., pp. 74-75).

The automobile was traveling eastwardly upon Scotland Street and the train northwardly upon its right-of-way, crossing Scotland Street (R., p. 65).

After the collision with the vehicle, the train ran approximately 325 feet (R., p. 80).

There are cross-arms on Scotland Street approaching the crossing from either direction, marked "Railroad Crossing" (R., Photograph, pp. 92-131-A). There are three tracks at the intersection of this railroad and Scotland Street, the middle track being the main track, upon which the accident happened, the gauge being four feet four inches, and the distance from the west line of the main track to the west line of the house track is fifteen feet eight inches. A stop sign, protruding upward into the street a few inches, was to the right of the middle of Scotland Street, going east, approximately twenty feet from the west rail of the house or west track (R., p. 64).

Guy Stringfellow was driving his car eastwardly upon Scotland Street approaching the railroad crossing at a rate of speed of between ten or fifteen miles per hour (R., p. 68). He did not stop his automobile before entering the track (R., pp. 67-71-78-79-80).

He slowed up his automobile slightly, looked in the direction from which the train was coming and speeded up to cross the tracks, and was hit (R., p. 72).

At the time Mr. Stringfellow looked in the direction from which the train was coming, he had just passed the witness, Mrs. Seely, who at that time was on the north side of Scotland Street, walking easterly, toward the crossing (R., pp. 70-71).

At the time Mr. Stringfellow looked in the direction from which the train was approaching and then speeded up, Mrs. Seely was approximately ninety feet from the crossing,

on the north side of Scotland Street, and she looked and saw the train approaching (R., p. 72).

The best distance that a train of this character traveling over this crossing, going at the rate of twelve or fifteen miles an hour, could be stopped, in the opinion of an expert, is 250 to 350 feet; going at a rate of speed of 35 miles an hour, it could be stopped from 450 to 500 feet (R., p. 83).

The engineer, being on the right-hand side of the train, proceeding north, did not see the automobile until the happening of the accident (R. 65). The fireman, on the left-hand side of the engine, proceeding north, when within 30 to 40 feet of the crossing, saw the car approaching the crossing 30 or 40 feet therefrom, and called a warning to the engineer, who immediately applied the emergency brakes (R., pp. 67-68). From a point fifteen feet eight inches of the west rail of the main line the view south is absolutely unobstructed (R., p. 61).

Disputed Facts.

Speed.—As to the speed of the train, plaintiff's witnesses testified at a rate of speed of from 35 to 40 miles an hour (R., p. 57), and defendant's witnesses testified at a rate of speed of from 10 to 15 miles an hour (R., p. 68).

Warning Signals.—The plaintiff's witnesses, with one exception, testified that they heard no bell nor whistle (R., pp. 57-61-62). One of the plaintiff's witnesses testified that he heard a big whistle and one or two small whistles (R., p. 59).

All of the defendant's witnesses testified that the whistle blew a number of times and the bell was rung constantly by an automatic bell-ringer (R., pp. 65-67-69-75-78-79-80-81-85).

Vision.—One of plaintiff's witnesses testified that you could only see southwardly on Scotland Street when

you reached a point on the side track, which is shown to be fifteen feet eight inches from the main track (R., p. 61).

Another of plaintiff's witnesses testified that while standing at the stop signal on the west side of the track, before the bushes were cut, he could see down the railroad track sixty-five feet.

The defendant's witnesses testified that at the stop signal, which is shown to be a distance of thirty-five feet from the main track, you could see down the track 250 feet (R., p. 64).

Another witness testified that she was half way between the Smart home and the crossing, on the north side of the street, which is testified as being 180 feet from the crossing, therefore, making her 90 feet from the crossing—and she saw the approaching train at the time Mr. Stringfellow looked in the same direction and then speeded up (R., p. 72).

Action of Lower Courts.

It was upon these disputed and undisputed facts that the district court directed verdicts in each of the cases covered by this petition, which verdicts were rendered by the jury (R., pp. 45-46), and in each of the cases judgment for the defendant was entered thereon (R., pp. 46 to 49).

An appeal was taken by the plaintiff on the pauper's oath in each of the cases, and the causes heard in the circuit court of appeals, which reversed the action of the district court in directing a verdict in the causes covered by this petition (R., pp. 96-98).

Action of This Court.

The writ of certiorari has been granted by this Court.

Opinion of Circuit Court of Appeals.

The opinion of the circuit court of appeals, reversing this case, contains many erroneous statements of fact, here-

tofore pointed out in the petition for certiorari, and in view of that court's holding in the case of the driver of the vehicle, Guy Stringfellow, not involved herein, arives at an impossible conclusion of law. That conclusion of law being, in short, that while the sole proximate cause of the accident resulting in the death of all of the parties, was the negligence of one of them, to wit, the driver, and that therefore there can be no recovery for the death of the driver, yet there can be a recovery for the death of the children, whom me may term "guests". See Opinion, Court of Appeals, Record, pp. 93 to 98.

ARGUMENT.

Construction of Opinion of Circuit Court of Appeals.

This opinion deals with five causes of action, one for the death of Guy Stringfellow, the driver and plaintiff's husband, four for the deaths of the two children riding with him, and in rendering the opinion in these consolidated causes, the court first dealt with the action resulting in the death of plaintiff's husband, to wit, the driver, and held that no recovery could be had for his death because the accident was the result of his negligence, the sole proximate cause thereof. Yet, notwithstanding this holding, the court then proceeded to determine the correctness of the action of the district court with respect to the four cases involving the death of the children, and held that a jury case was presented.

In order that there may be no uncertainty as to what the court held, in so far as the driver of the car was concerned, we have attached as an appendix to this brief a copy of the opinion of the circuit court of appeals in dealing with the cause of action with respect to the driver of the vehicle, eliding therefrom only that portion of the opinion referring to other causes of action. The italics therein are ours.

It is true that in that part of the opinion dealing with the causes of action herein discussed, the circuit court of appeals, in its opinion, stated that:

> "The judgment is defended as to them only on the theory that the father's negligence was the sole proximate cause of their deaths. But the jury might reasonably have concluded that their deaths were caused by the combined or concurrent negligence of their father and the railroad company" (R., p. 96).

Again, to show that this was the holding of the circuit court of appeals, it will be seen that after holding as a matter of law there could be no recovery for the death of plaintiff's husband, the driver of the car, many Florida cases were cited as authorities for its so doing, and in each and every of the cases thus cited, the sole determinative question was whether or not the accident was brought about by the sole negligence of the plaintiff, and in not one of which was the question of concurring negligence involved.

It would seem, therefore, to be a reflection upon that court to assert that it would advance a proposition of law and cite authorities to sustain such a proposition, which authorities hold exactly contrary to the proposition it advanced.

In each of the cases thus cited, as above referred to, our so-called Comparative Negligence Statute was discussed, and in a number of which it was unequivocally stated that where there was concurring proximate negligence, there could be recovery, but the damages should be diminished. (See particularly *Florida East Coast Ry. Co.* v. *Davis*, 96 Fla. 171, 117 Sou. 842.)

The most plausible solution of the incongruous position taken by the circuit court of appeals is that they held that the driver of the car had the last clear chance to avoid the accident resulting in his death, and, therefore, his act

became the proximate cause of the accident and any negligence of the railroad became a remote cause, but that the negligence of the driver, not being imputable to the children, therefore the concurring proximate negligence of the driver with that of the remote negligence of the railroad company transformed the railroad's remote negligence into a proximate cause. This is not the law.

A clear statement of the law will be found in *R. C. L.*, Vol. 20, Par. 89, Pg. 104, wherein it is said:

> "Again, unless the ultimate injury is the natural and probable consequence of the defendant's act of negligence, that act is not the proximate cause of the injury, and no action can be maintained upon it, whether the succeeding injury results from that act alone or from that act and the concurring or succeeding negligence of a stranger. In other words, the concurring negligence of another cannot transform an act of negligence which is so remote a cause of an injury that it is not actionable into a cause so proximate that an action can be maintained upon it. It cannot create a liability against one who does not legally cause it, or make an injury the natural and probable result of a prior act of negligence which was not, or would not have been, such a result in its absence."

After all, the so-called "last clear chance" doctrine is a method of determining the proximate cause, and whether it is called "last clear chance", "intervening cause", or "efficient cause" is immaterial.

Milwaukee & St. Paul Ry. Co. v. *Kellogg*, 94 U. S. 469, 24 Law Ed. 256;

Ætna Insurance Co. v. *Boon*, 95 U. S. 117, 24 Law Ed. 395.

Circuit Judge Sanborn, in the case of *Cole* v. *German Savings and Loan Association*, 124 Fed. 113, 59 C. C. A.

593, 63 L. R. A., page 416, discussed very learnedly the question of proximate cause and intervening causes, and made this pertinent observation:

> "It is now no longer difficult to determine whether or not the acts of the defendant were the proximate cause of the injury to the plaintiff. Wharton says: 'Supposing that, if it had not been for the intervention of a responsible third party, the defendant's negligence would have produced no damage to the plaintiff, is the defendant liable to the plaintiff? This question must be answered in the negative, for the general reason that causal connection between negligence and damage is broken by the interposition of independent responsible human action. I am negligent on a particular subject-matter (as to which I am not contractually bound). Another person, moving independently, comes in and either negligently or maliciously so acts as to make my negligence injurious to a third person. If so, the person so intervening acts as a nonconductor, and insulates my negligence, so that I cannot be sued for the mischief which the person so intervening directly produces. He is the one who is liable to the person injured.'"

So that we insist that if the circuit court of appeals were predicating their action in reversing the causes, involving the death of the minor children, on the theory that because the children were guilty of no negligence that the negligence of the railroad company, which was as to the driver a remote cause, was thereby transformed into a proximate cause, it is illogical and unsound and not supported by any authority.

The Applicable Law.

Section 7051, *C. G. L., Florida,* 1927, the so-called Presumption Statute, is procedural and the presumption of negligence of the defendant railroad company, which arises

thereunder upon proof of damage done by the running of a train, is at an end when the defendant adduces evidence tending to show that its employees had exercised all ordinary and reasonable care and diligence to avoid the collision,

The burden of proof is then upon the Plaintiff, and the Plaintiff may then recover only upon a showing by a preponderance of the evidence of the negligent injury that is duly alleged.

Atlantic Coast Line R. R. C. v. *Britton*, — Fla. — (not yet officially reported), 146 Sou. page 842.

Seaboard Air Line R. R. Co. v. *Watson*, 103 Fla. 477, 137 Sou. page 719.

Any other construction of this statute would bring it within the vice of the rule laid down in:

Western & Atlantic Railroad Co. v. *Henderson*, 279 U. S. 639, 73 Law Ed. 884.

Seaboard Air Line R. R. Co. v. *Watson*, 287 U. S. 86; 77 Law Ed. page 68 (decided Nov. 7, 1932).

Atlantic Coast Line R. R. Co. v. *Katherine H. Ford*, 287 U. S. 502, 77 Law Ed. 355 (decided Jan. 9, 1933).

Section 7052, *C. G. L., Florida*, 1927, the so-called Comparative Negligence Statute, is not involved herein. Plaintiff's children were guilty of no negligence. This is conceded.

The defendant, having adduced evidence tending to show that its employees had exercised all ordinary and reasonable care and diligence to avoid the collision, the burden of proof was on the plaintiff to show:

(*a*) Negligence on the part of the defendant.

Atlantic Coast Line R. R. Co. v. *Britton*, — Fla. — (see above), 146 Sou. 842.

(*b*) That such negligence was the proximate cause of the accident.

Chicago, Rock Island & Pacific R. R. Co. v. *Houston*, 95 U. S. 697, 24 Law Ed. 542.

Baltimore & Ohio Railroad Co. v. *Tindall*, 47 Fed. (2d), page 19.

New York Central Railroad Co. v. *Antonia Ambrose*, as administratrix, etc., 280 U. S. 486, 74 Law Ed. 562:

> "That one who discovers the imminent approach of a train moving at a dangerous rate of speed, and, measuring the distance to the crossing, attempts to beat the passage of the train and fails to his hurt, cannot recover for previous simple negligence of the railroad company."

Central of Georgia Ry. Co. v. *Faust*, 17 Ala. A. 96, 82 Sou. page 36-39.

> "When the evidence is undisputed or of such conclusive character that, if a verdict was returned for one party, it would have to be set aside, in the exercise of a sound judicial discretion, the court should direct a verdict for the other party."

Small Company v. *Lamborn & Co.*, 267 U. S. 248, 69 Law Ed. page 597.

A directed verdict was correctly given in these causes, because, in the words of the Supreme Court of Kansas:

> "Jurors are not permitted to set their eyes to what everybody else sees and understands and wander off into fields of imagination and suspicion in order to reach verdicts. Courts are more and more realizing and declaring that they must not permit themselves to be more ignorant than anybody else or fail to see what is plain to every one and everybody except a court."

Deweese v. *Sovereign Camp, W. O. W.*, 110 Kan. 434, 204 Pac. 523, see pages 526-527.

Conclusion.

It is perfectly apparent from this record that the defendant, having adduced proof of the exercise by its employees of due and reasonable care, that the plaintiff failed to meet the burden of proof thus cast upon it, to show that the accident was the result of the negligence of the defendant.

It is, likewise, apparent from this record that the driver of this vehicle looked and saw the approaching train, miscalculated his ability to cross safely, took a chance and lost, and that his act in so doing was the sole proximate cause of this accident.

It is respectfully submitted that the action of the circuit court of appeals in reversing and remanding these causes for a new trial was erroneous, and its action therein should be reversed, and the action of the lower court affirmed.

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APPENDIX "A."

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 6617.

SARAH ELIZABETH STRINGFELLOW, *a Widow,*

vs.

ATLANTIC COAST LINE RAILROAD COMPANY, *a Corporation.*

In Forma Pauperis.

Appeal from the District Court of the United States for the Southern District of Florida.

Before Bryan, Sibley, and Hutcheson, Circuit Judges.

OPINION—Filed March 31, 1933.

BRYAN, *Circuit Judge:*

Appellant, in her own right as widow * * * brought * * * actions * * * against the appellee railroad company for negligently running its train and fatally injuring her husband * * * at a street crossing in the town of Dunedin, Florida. Negligence was alleged (1) in failing to give warning of the approach of the train by sounding the whistle or ringing the bell of the engine, and (2) in running the train upon the street crossing at a dangerous rate of speed. Appellee pleaded not guilty and at the close of all the evidence the trial court directed a verdict in its favor upon the ground that the injuries complained of were caused solely by the negligence of appellant's husband. Appellant contends in support of her assignments that it was error to take the case away from the jury.

The accident, which resulted in the injuries alleged, occurred in the daytime at a grade crossing where Scotland

Street intersects the railroad right-of-way at right angles, the street extending east and west and the right-of-way north and south. On the right-of-way the main line was flanked on either side by a side track. To the south of the crossing the main line was straight for half a mile or more, but the view in that direction of one going east on the street was cut off by trees until the west side track, within 20 feet of the main line, was reached, at which point the view to the south was open and unobstructed. At the time of the accident appellant's husband was driving his automobile, in which his children, one seven, and the other nine years of age, were riding with him, toward the east across the intersection; and the train was coming from the south. The train was a few minutes late, and was not due to stop at Dunedin. A strong wind from the north-west interfered with the hearing of anyone at the crossing who might be listening for the rumble of the train, or for any warning that might have been given by whistle or bell. The evidence was in hopeless conflict as to whether the whistle was sounded or the bell was rung, and also as to the speed of the train. Several witnesses for appellant who were near the place of the accident and in position to hear testified that they heard no whistle or bell; and they gave various estimates of the rate of speed, ranging from 30 to 50 miles per hour. Two of these witnesses cited as evidence of their ability to estimate speed speedometer tests which they said they had made, while traveling by automobile on highways parallel with railroad tracks, of the speed of trains going in the same direction as they were. On the other hand witnesses for appellee, particularly the engineer, fireman and members of the train crew, testified that as the train approached Scotland Street the last of four blasts of the whistle was sounded, and that the bell was being rung by an automatic ringer from the time the train reached the fourth street south of Scotland Street until after the accident. Members of the train crew also testified that the train had slackened speed as it passed through Dunedin, and that it was running at a rate not exceeding 10 or 12 miles per hour as it approached Scotland Street. The fireman testified that he saw appellant's husband drive upon

the crossing about 60 feet in front of the engine, and that he called to the engineer who immediately put on the emergency brakes. The engineer testified that he did not see the automobile because it approached from the west and he was on the east side of the engine, but that he applied the emergency brakes as soon as the fireman called out to him and stopped the train as quickly as was possible. The engine proceeded about 100 yards north of Scotland Street before it was brought to a standstill. Several witnesses for appellee testified that appellant's husband drove across the intersection at a speed of 10 to 15 miles per hour; but the testimony as a whole leaves it uncertain whether he stopped or slackened speed when he arrived at the crossing, and whether he actually saw the train.

Compiled General Laws of Florida provide:

"A railroad company shall be liable for any damage done to persons, stock or other property, by the running of the locomotives, or cars, or other machinery of such company, or for damage done by any person in the employ and service of such company, unless the company shall make it appear that their agents have exercises all ordinary and reasonable care and diligence, the presumption in all cases being against the company." Chap. 7051.

"No person shall recover damages from a railroad company for injury to himself or his property, where the same is done by his consent, or is caused by his own negligence. If the complainant and the agents of the company are both at fault the former may recover, but the damages shall be diminished or increased by the jury in proportion to the amount of default attributable to him." Chap. 7052.

It is plain that under Chapter 7051 a prima facie case was made out. *It is appellee's contention that the presumption of its negligence, which arose under that section, upon proof of the injuries as alleged, was overcome by further proof which disclosed that those injuries were caused solely by the negligence of the injured persons, and that*

the case presented is not one which calls for the application of the rule prescribed in Chapter 7052 for apportionment of damages, because no fault was attributable to it. Of course appellant could not recover for the death of any party who could not if living have recovered damages because of his injury. In so far as the case depends upon appellant's right to recover for the death of her husband, we are of the opinion that it was not error to direct a verdict for appellee. Her husband as driver of the automobile was under the duty of exercising the care and caution which a reasonably prudent man would have displayed under the same or similar circumstances. It therefore was his duty to use his senses of sight and hearing before undertaking to cross the railroad tracks. If when he had passed the trees and had an open view down the track he had looked he would have seen the train and could have avoided the collision. *A careful and prudent driver of an automobile would not under the circumstances have undertaken to drive over the crossing in front of the approaching. train.* Notwithstanding Chapter 7052 he could not have recovered for an injury, and so recovery cannot be had on account of his death. *S. A. L. Ry.* v. *Tomberlin,* 70 Fla. 435; *Egley* v. *S. A. L. Ry.,* 84 Fla. 147; *A. C. L. R. R. Co.* v. *Gornto,* 89 Fla. 97; *F. E. C. Ry.* v. *Davis,* 96 Fla. 171; *Covington* v. *S. A. L. Ry.,* 99 Fla, 1102; *Southern Ry. Co.* v. *Mann;* — Fla. —, 108 Sou. 889.

NOTE.—(*a*) We have elided from the opinion that portion thereof relating to the alleged causes of action other than the one under discussion.

(*b*) Italicized portion ours.

